NO. 45497-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CALVERT R. ANDERSON, JR.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated Mr. Anderson's constitutional right to a public trial by taking for-cause challenges in a proceeding closed from public view.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

During jury selection, Mr. Anderson and the court made for-cause challenges and dismissed jurors at a private sidebar. As the trial court did not analyze the *Bone-Club*[1] factors before conducting this important portion of jury selection in private, did the court violate Mr. Anderson's constitutional right to a public trial?

C. STATEMENT OF THE CASE

After an altercation occurred between Calvert Anderson and two police officers at the Lacey Walmart, the state charged Mr. Anderson with Assault in the Third Degree[2] and Obstructing a Law Enforcement Officer.[3] CP 3; RP[4] 1-167.

A jury heard Mr. Anderson's trial. RP 1-238. During jury selection, the court heard and ruled on for-cause challenges to individual jurors in sidebar. RP 12-13. Mr. Anderson made four for-cause

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[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995)
[2] RCW 9A.36.030(1)(g)
[3] RCW 9A.76.020
[4] There are three volumes of verbatim report of proceedings for this appeal. "RP" refers Trial Volumes I and II. "RP Sentencing" refers to the October 23, 2013, sentencing.

challenges and the court excused one juror for-cause on its own initiative. RP 12-13. The court later put the results of the sidebar on the record in open court. RP 12-13.

The jury found Mr. Anderson guilty as charged on both counts. CP 4, 5. He received a 38 month sentence on the assault and 12 concurrent months on the obstructing, plus 12 months of community custody. RP Sentencing 10-11; CP 21-22.

Mr. Anderson makes a timely appeal of all portions of his Judgment and Sentence. RP Sentencing 10-11; CP 6-16.

D. ARGUMENT

THE TRIAL COURT VIOLATED MR. ANDERSON'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING FOR-CAUSE CHALLENGES AT SIDEBAR.

The trial court heard and ruled on for-cause challenges to individual jurors in sidebar. This private conference, intentionally made unavailable to the public, denied Mr. Anderson his constitutionally guaranteed right to a public trial. Consequently, Mr. Anderson's convictions should be reversed and his case remanded for a new trial.

The Sixth Amendment to the United State Constitution and Article I, Section 22 of the Washington Constitution guarantee the accused a

public trial by an impartial jury.[5] *Pressley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); *Bone-Club*, 128 Wn.2d at 261-62. Additionally, Article I, Section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This later provision gives the public and the press a right to open and accessible court proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The public trial requirement is for the benefit of the accused; it allows the public to ensure the accused is tried fairly and to keep the court and the parties keenly aware of their responsibilities and the importance of their roles. *Bone-Club*, 128 Wn.2d at 259. As the United States Supreme Court observed:

> The open trial...plays as important a role in the administration of justice today as it did for centuries before our separation from England....Openness...enhances both the basis fairness of the criminal trial and the appearance of fairness so essential to public confidence.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The right to a public trial includes "'circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as determining deviations from

[5] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." Article I, section 22 provides that "[i]n criminal prosecutions the accused shall have the right ... to a speedy public trial by an impartial jury...."

established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." *State v. Slert*, 169 Wn. App. 766, 772, 282 P.3d 101 (2012), *review granted in part*, 176 Wn.2d 1031 (2013)[6] (quoting *State v. Bennett*, 168 Wn. App. 197, 202, 275 P.3d 1224 (2012)).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in *Bone-Club*.[7] *In re Personal Restraint of Orange*, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation is presumed prejudicial and is not subject to

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[6] In *Slert*, this Court reversed Slert's convictions, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a jury questionnaire violated Slert's right to a public trial. 169 Wn. App. at 778-79.

[7] The Bone–Club factors are:
"1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
"2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
"3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
"4. The court must weigh the competing interests of the proponent of closure and the public.
"5. The order must be no broader in its application or duration than necessary to serve its purpose." (quoting Allied *Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210–11, 848 P.2d 1258 (1993)).

harmless error analysis. *State v. Wise*, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); *State v. Esterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); *Orange*, 152 Wn.2d at 814.

The accused's right to a public trial under both the federal and the state constitutions applies to voir dire. *Pressley*, 130 S. Ct. at 724; *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). Washington courts have repeatedly held that jury selection conducted in chambers violates the right to a public trial. See, e.g., *Strode*, 167 Wn.2d at 226-29 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *State v. Heath*, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009); *State v. Frawley*, 140 Wn. App. 713, 718-21, 167 P.3d 593 (2007).

The right to challenge a potential juror for cause is an integral part of a "fair trial." *People v. Rhodus*, 870 P.2d 470, 474 (Colo 1994). Thus, the constitutional public trial right must extend to that portion of criminal proceedings as well. *People v. Harris*, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (holding peremptory challenges conducted as sidebar violate public trial right, even when such proceedings are reported). The trial court violated Mr. Anderson's constitutional right to a public trial by taking for-cause challenges during a private sidebar.

Because the error is structural, prejudice is presumed, and thus reversal is required. *Strode*, 167 Wn.2d at 231.

Division Three of this court, in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013), reached a contrary result, as has this division in *State v. Dunn*, __ P.3d __, W L 1379172 (Wn. App. Div. 2, 2014).

In *Love*, the trial court similarly heard for-cause challenges at sidebar. Like Mr. Anderson, defendant Love argued the sidebar voir dire denied him his right to a public trial. In holding that Love's public trial right was not denied, the court applied the "experience and logic" test announced in *State v. Sublett*, 176 Wn.2d 58, 141, 292 P.3d 715 (2012). The "experience and logic" test requires courts to assess the necessity for courtroom closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *Sublett*, 176 Wn.2d at 73.[8] The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* If both prongs are answered affirmatively, then the *Bone-Club* test must be applied before the court can close the courtroom. *Sublett*, 176 Wn.2d at 73.

Applying the experience prong, the *Love* court concluded, "[T]here is little evidence of the public exercise of such challenges, and some

[8] Although no opinion gathered more than four votes in *Sublett*, eight of the nine justices sitting in *Sublett* approved the "experience and logic" test.

evidence that they are conducted privately." *Love*, 176 Wn. App. at 919. Applying the logic prong, the court concluded such challenges do not need to be conducted in public because to do so does not further the goal of ensuring a fair trial. *Id.*

The court's analysis in *Love*[9] misses the mark and ignores the historical importance of an open voir dire. It is well established that the right to a public trial extends to voir dire. *Sublett*, 176 Wn.2d at 71; *Strode*, 167 Wn.2d at 226. The process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Orange*, 152 Wn.2d at 804.

Openness of jury selection clearly enhances core values of the public trial right, i.e., "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Sublett*, 176 Wn.2d at 75. "For-cause" challenges are an integral part of voir dire. *Strode*, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

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[9] The Supreme Court has stayed Love's petition for review of Division Three's opinion pending the outcome of *State v. William Glenn Smith* (85809-8). The Court heard the *Smith* oral argument on October 15, 2013.

Accordingly, the experience and logic test is clearly met in the case of voir dire: historically, voir dire has been conducted in open court; and logically, openness clearly enhances the basic fairness of the proceeding.

In *Dunn*, the defendant argued the trial court violated his public trial right because the trial court conducted the peremptory challenges portion of jury selection at the clerk's station. *Dunn*, WL 1379172 at 2. This court did not engage in a separate analysis. Rather it adopted the rationale in *Love*. "We agree with Division Three that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right." *Dunn*, WL 1379172 at 3.

Dunn, in its adoption of *Love*, relies on the same flawed reasoning of *Love*.

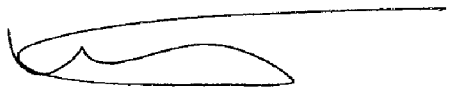
The procedure in Mr. Anderson's case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Even though the procedure occurred in an otherwise open courtroom, any assertion that the procedure was in fact public should be rejected. The procedure was a sidebar which occurs outside of the public's hearing, and thus violates Mr. Anderson's right to a fair public trial. *Slert*, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating, "If a side-bar conference was used to dismiss jurors,

the discussion would have involved dismissal of jurors for case-specific reason and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview").

E. CONCLUSION

Mr. Anderson's convictions should be reversed and his case remanded for a new trial.

Respectfully submitted this 13th day of April 2014.



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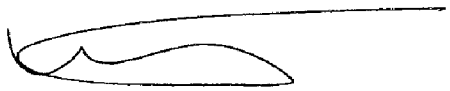
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) the Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Calvert R.. Anderson, Jr./DOC#839323, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed April 13, 2014, in Longview, Washington.



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